

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OTIS R. MYLES and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Houston, TX

*Docket No. 02-307; Submitted on the Record;
Issued July 2, 2002*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained major depression, generalized anxiety and an acute anxiety reaction in the performance of duty as alleged.

On June 5, 2001 appellant, then a 59-year-old housekeeping aide supervisor, filed a claim for severe stress which he attributed to a meeting that day with Manager Robert McFarland, who informed him that he was being investigated for alleged sexual harassment of Angela Moore, a housekeeping aide under appellant's supervision. Mr. McFarland advised appellant that Ms. Moore would be reassigned until the investigation was complete. Appellant stated that he experienced anger, disbelief and stress.¹

In a June 8, 2001 memorandum, Mr. McFarland stated that, at the June 5, 2001 meeting with appellant, he informed appellant that Ms. Moore was reassigned because of her allegations that appellant had asked her for a hug on January 5, 2001 after she voluntarily embraced another male coworker and wrote up a fact-finding meeting improperly.

In a June 25, 2001 letter, Mr. McFarland controverted appellant's claim. On June 5, 2001 he informed appellant that on June 4, 2001, he agreed with appellant's recommendation that he reassign Ms. Moore because she claimed sexual harassment by several coworkers. Appellant investigated these allegations and concluded that they were unfounded. Ms. Moore requested that she not be moved back under appellant's supervision, as she believed that appellant's finding that her accusations were baseless constituted sexual harassment.

¹ In a June 5, 2001 report, Dr. Jaime Ortiz Toro, an internist practicing at the employing establishment, diagnosed acute stress and recommended an immediate psychiatric referral. In a June 5, 2001 report, Dr. Dionisio Alquiza, an attending psychiatrist, related appellant's account of being "investigated for allegations of sexual harassment, by one of his subordinates, for allegedly making sexual comments." Dr. Alquiza diagnosed an "acute stress reaction" and found appellant totally disabled for work. He repeated this diagnosis and finding of disability in a July 5, 2001 report.

Mr. McFarland thus, believed it would be best for Ms. Moore to be reassigned. Appellant allegedly became “angry and stated that he was going to get to the bottom of this, someone was going to pay.... [Appellant] was going to get the person that assigned Ms. Moore to him.” Mr. McFarland played a tape of Ms. Moore complaining of her difficulties on the fifth floor and stated that “[a]t no time was [appellant] informed that he had done anything wrong or incorrect. [Appellant] was not counseled, informed of a reassignment, demotion or told of any action that was planned to be taken against him,” only that Ms. Moore would be reassigned until the investigation was complete.

By decision dated August 1, 2001, the Office denied appellant’s claim on the grounds that the evidence did not demonstrate that appellant had sustained any injury or condition in the performance of duty. The Office of Workers’ Compensation Programs found that appellant had not alleged or established any compensable factors of employment. The Office accepted that Ms. Moore alleged inappropriate behavior by male coworkers and that she was detailed to another work area. The Office found that these were administrative or personnel matters not within the performance of appellant’s duties as no error or abuse was shown.

In an August 17, 2001 letter, appellant requested reconsideration. He alleged that Willie Turner, an employing establishment compensation official, erroneously stopped his continuation of pay benefits and that Ms. Moore was a problem employee whom he requested be transferred to another unit. Appellant submitted additional medical evidence.²

Appellant submitted copies of sexual harassment complaints Ms. Moore had made against other coworkers. On January 4, 2001 Ms. Moore alleged that during lunch on the day of new employee orientation, a female coworker made sexual remarks. Appellant advised Ms. Moore on January 4, 2001 to see two other supervisors, as he would be absent on prescheduled leave. On January 7, 2001 Ms. Moore stated that she hugged coworker Irvin Harvey and told him where she might be going out that evening, but then received unwanted attention from Mr. Harvey. Ms. Moore later alleged that appellant also asked for a hug. On May 31, 2001 Ms. Moore alleged that coworker Marvin Vean pulled one of her pants pockets on May 25, 2001. Appellant investigated this complaint and could find no corroborating witnesses.

In a June 6, 2001 electronic mail message, Christopher J. Gonzales, a supervisor at the employing establishment, accepted Ms. Moore’s transfer to his unit. Mr. Gonzales noted Ms. Moore’s multiple accusations against her coworkers, but that she did not accuse appellant of sexual harassment.

In an August 8, 2001 memorandum, Audrey Harrison, an employing establishment supervisor, noted that appellant had requested Ms. Moore be transferred as she had many problems and feared that his supervisory interactions with her would be misconstrued as sexual harassment.

² In a July 5, 2001 report, Dr. Gary Berriesford, an attending psychiatrist, related appellant’s account of Ms. Moore’s accusations and diagnosed a “severe stress reaction” and held appellant off work for four weeks. In an August 9, 2001 report, Dr. Lawrence Ginsberg, an attending psychiatrist, found appellant indefinitely disabled for work due to “excessive worrying and depression.” Dr. Ginsberg noted that appellant’s “generalized anxiety and depression” began on June 5, 2001, when he was accused of sexual harassment.”

By decision dated October 11, 2001, the Office denied modification of the August 1, 2001 decision. The Office found that appellant had established as factual that Ms. Moore had accused him of sexual harassment, but that the accusation was not a compensable factor of employment. The Office further found that appellant established that Mr. Turner stopped his continuation of pay benefits, but that this was not a compensable factor. The Office found that appellant had not established any error or abuse by the employing establishment regarding Ms. Moore's allegations or the handling of his compensation claim.

The Board finds that appellant has not established that he sustained an emotional condition arising in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to employment. Where disability results from an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the Federal Employees' Compensation Act's coverage.³ As part of its adjudicatory function, the Office must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁴ When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. Perceptions and feelings alone are not compensable. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁵

In this case, appellant attributed the claimed emotional condition, in part, to being accused by a subordinate, Ms. Moore, of sexual harassment and being informed on June 5, 2001 by manager Mr. McFarland that he was to be investigated for alleged sexual harassment. Further, he was advised that Ms. Moore would be reassigned until the investigation was complete. However, the Board has held that disciplinary charges, investigations and related meetings, which are administrative functions of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.⁶ In this case, appellant has not demonstrated that the investigation was a part of his regular duties or that he had been specially assigned any task related to the investigation. The Board therefore, finds that the investigation did not involve appellant's regular or specially assigned duties.

The Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *See Barbara Bush*, 38 ECAB 710 (1987).

⁵ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁶ *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.⁷

In this case, appellant submitted copies of three complaints of sexual harassment Ms. Moore made against coworkers, including a January 7, 2001 complaint that appellant had harassed her. The Board finds that the employing establishment acted reasonably in its decision to investigate Ms. Moore's accusations, including those against appellant. The Board notes, however, that at the time appellant filed his claim on June 5, 2001, an investigation had not risen to a disciplinary matter. Mr. McFarland stated in a June 25, 2001 letter that in the June 5, 2001 meeting, appellant was not counseled, informed of a reassignment, demotion or told of any action that was planned to be taken against him. There is no indication of any premature judgment against appellant by the employing establishment or any error in the proposed administrative action. Appellant has submitted insufficient evidence to indicate that the employing establishment committed error or abuse. He has thus, failed to establish a compensable factor of employment in this regard.⁸

Appellant also attributed his claim, in part to Mr. Turner, an employing establishment compensation official, stopping his continuation of pay after it was determined that appellant had not established a compensable factor of employment. The Board has held that the handling of a claim for compensation is not a factor of federal employment and any stress resulting therefrom is not compensable as an injury arising in the performance of duty.⁹ Appellant has not demonstrated that the employing establishment acted unreasonably in terminating his continuation of pay once it determined that the claimed condition did not arise in the performance of duty. Thus, the employing establishment's decision to terminate continuation of pay is not a compensable factor of employment.

Consequently, appellant has not established that he sustained an emotional condition in the performance of duty, as he submitted insufficient evidence to establish any compensable factors of employment.¹⁰

⁷ See *Richard Dube*, 42 ECAB 916 (1991).

⁸ See *Frederick D. Richardson*, 45 ECAB 454 (1994).

⁹ See *Ralph O. Webster*, 38 ECAB 521 (1987) (employee's emotional condition, resulting in part from actions relating to his claim under the Act, was found to be self-generated and not within the coverage of the Act); *Elvira B. Lightner*, 39 ECAB 118 (1987) (the fact that an employee had become upset because of late compensation payments was not sufficient to bring the employee's death into the performance of duty).

¹⁰ As appellant has not established any compensable factor of employment, the medical record need not be addressed, as the issue of causal relationship is moot. *Margaret S. Krzycki*, 43 ECAB 384 (1992).

The decisions of the Office of Workers' Compensation Programs dated October 11 and August 1, 2001 are hereby affirmed.

Dated, Washington, DC
July 2, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member